SIME SECURITIES SDN BHD

v.

ANTHONY LEE SIN CHOY

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[SUIT NO: D5-22-5-1996]
3 DECEMBER 2002

CONTRACT: *Breach - Shares - Sale and purchase - Defendant failed to take up shares when due - Whether plaintiff entitled to force sell shares - Whether within plaintiff's discretion to decide when to force sell shares - Delay in force selling shares - Instruction to force sell shares not adhered to - Defendant suffered contra loss - Whether plaintiff waived right to force sell shares - Whether refusal to adhere to defendant's instruction tantamount to breach - Whether counter claim for damages allowable*

The defendant had instructed the plaintiff, which was UMBC Securities Sdn Bhd at the relevant time, to buy 50 lots of Cash (a company) shares. The plaintiff completed the transaction but the defendant failed to take up the shares when they were due for payment. Under the rules of trading prevailing then, the plaintiff was entitled to force sell the said shares by the ninth day of transaction and to remit any contra gain, or contra loss, to the defendant's trading account. The plaintiff had sold the said shares close to eight months later which resulted in the defendant making a contra loss. The plaintiff's present claim was for the amount due from the said transaction.

The defendant counter-claimed, contending that he had instructed the plaintiff through its senior general manager to force sell the shares at a certain date which would have resulted in a contra gain, instead of a contra loss.

Held:

[1] The defendant's obligation to pay for the purchase of the shares by the prescribed period had not been varied. Accordingly, the plaintiff's failure to sell the shares on the relevant date, as mandated by the KLSE, was by its own default. The plaintiff did not submit any evidence to justify the seven-month delay in selling the said shares after the date of transaction. Therefore, it could be concluded that the sale could not have been conducted *bona fide* to recover the plaintiff's loss. The plaintiff could not therefore place reliance on cl. f as contended. (p 294 a-b)

[2] Time is of the essence in the stock exchange environment and a stock broker is perfectly entitled to look after his own interests in as much as he may have to contemplate on his client's own interest. Therefore, a stockbroker's duty is discharged if he acts *bona fide* with reasonable promptitude to dispose of his client's shares to recover his loss at the price then prevailing. (p 293 h)

[3] At common law, a party may waive (with or without consideration) his right or a part thereof in a contract. This principle is embodied in s. 64 of the Contracts Act 1950. (p 294 d)

[4] The plaintiff had waived the right to sell the shares on the relevant day when it failed to force sell the said shares as required under the Prescribed Regulations for Selling-out. Whilst the plaintiff had the contractual right to sell the shares to recover the purchase price in the event of a non-payment, the defendant continued to exercise control and dominion over the shares until they were sold. Therefore, he was at liberty to direct the plaintiff to sell the shares as instructed. (pp 294 h & 295 a-b)

[5] Based on the facts, the defendant did instruct the plaintiff's senior general manager to convey the sell order to the dealer's representative and in absence of any evidence of a collusion between the defendant and the senior general manager, the instruction constituted an effective order to the plaintiff to sell the shares. The plaintiff's failure to sell the said shares as instructed constituted a breach of an essential term of the contract, express or implied, to which the defendant was entitled to claim damages. Had the plaintiff followed the defendant's instruction, the latter could have made a substantial contra gain instead of a contra loss. (p 295 b & e)

[Plaintiff's claim dismissed with costs; defendant's counter-claim allowed with costs.]

Case(s) referred to:

Associated Pan Malaysia Cement Sdn Bhd v. Syarikat Teknikal & Kejuruteraan Sdn Bhd [1990] 2 CLJ 913; [1990] 1 CLJ (Rep) 15 ***(refd)***

Keppel Finance Ltd v. Phoon Ah Lek [1994] 3 MLJ 26 ***(dist)***

UMBC Securities Sdn Bhd v. Tan Chee Aan [2001] 6 CLJ 341 ***(dist)***

Legislation referred to:

Contracts Act 1950, s. 64

Other source(s) referred to:
McGregor on Damages, 16th edn, para 285

For the plaintiff - R Yogeswari Rathakrishnan; M/s Che Mokhtar & Co
For the defendant - Steven Puung; M/s Isharidah, Ho, Chong & Menon

Reported by M Maheswaran

JUDGMENT

Kang Hwee Gee J:
The defendant Anthony Lee Sin Choy, was a direct client of the plaintiff UMBC Securities Sdn Bhd, a licensed stockbroker of the Kuala Lumpur Stock Exchange (KLSE).

The plaintiff's claim in this case was in respect of the payment of 50 lots of Cash shares which the plaintiff had purchased on his instruction on 1 March 1994.

The purchase was made through the plaintiff's dealer's representative Leow Yuen Fong but placed through its Senior General Manager Yong Yuen Fatt with whom the defendant was well acquainted with.

The defendant did not take up the shares when they were due for payment on the 8th day of transaction (T+7) as required under the rules of trading then prevailing. Under the same rules, the plaintiff would be entitled to force sell them through the exchange by the 9th day of transaction (T+8) and to remit any contra gain or contra loss to the defendant's trading account.

But the plaintiff did not force sell the shares on that day or on the subsequent days thereafter until the Cash counter was suddenly suspended by the KLSE on 16 May 1994.

According to Yeap Hock Beng, an officer in the plaintiff's credit control department, Yong gave instruction to him not to force sell the shares on T+8. But whether he also gave instruction not to force sell with respect to the period after T+8 is unclear from the evidence.

The suspension was lifted and the counter reopened for trading a month later on 17 June 1994.

Still the plaintiff did not act to force sell the shares.

Three days later on the morning of 20 June 1994 Cash shares were trading at a high of RM11.20. The defendant decided to act. At about 11 am on that day, according to his testimony, he tried to contact Leow. Unable to get him at his desk he then rang Yong and after informing him of his predicament, requested Yong to pass on the instruction to Leow to sell all the 50 lots.

According to Yong (who gave evidence for the defendant) he immediately carried out the instruction. At lunch time however, he was informed by Leow that his instruction had not been carried out but was assured that he would try to sell them in the afternoon at RM11.20 or higher. He informed Leow to monitor the price carefully in order to have them sold. By afternoon however, the price of Cash shares had dropped reaching a low of RM9.60 for the day. Leow was unable to sell them at RM11.20 and so they remained unsold.

Leow who gave evidence for the plaintiff however, denied that he was ever instructed by Yong to sell the 50 lots of Cash shares on 20 June 1994.

Still the shares were not forced sold after 20 June 1994. They were sold only some seven months and three weeks later on 13 February 1995 by the plaintiff's Credit Control Department by two transactions for the cumulative sum of RM335,920. No evidence was adduced as to why there was such a long delay in disposing of the shares.

The Disputes

The plaintiff's claim against the defendant was for the payment of the 50 lots of Cash shares purchased on his instruction on 1 March 1994 less the amount recovered by force selling on 20 June 1994, to arrive at the sum of RM226,790.42. The plaintiff also claimed a further late payment charge of RM72,067.26, costs and interests.

The defendant denied owing the plaintiff the sum claimed. Instead he counterclaimed on the basis that had the plaintiff sold the 50 lots Cash shares on 20 June 1994 as instructed by him, he would have a contra gain of RM49,619.33 instead of a contra loss of RM226,790.42 when the shares were force-sold on 20 June 1994.

The Basis Of The Plaintiff's Claim

The plaintiff's claim against the defendant is premised entirely on the argument that the defendant was bound by cl. (a) read with cl. (f) of the account application form which he had signed with the plaintiff. The two clauses read as follows:

By signing below, I ...

(a) request you to open an Account in UMBC Securities Sdn Bhd (UMBCS) and undertake to abide by the rules and regulations of the Kuala Lumpur Stock Exchange and the Securities Act.

(f) authorized you to deal with all the stocks and/or shares bought for my account for which I have not paid in any manner you deem fit.

The relevant rule and regulation of the KLSE referred to in cl. (a) above was the Prescribed Regulations for Selling-out made pursuant to r. 8 of the Rules for Trading by Member Companies (then in force). It read as follows:

> Member companies shall close-off purchase positions of clients who fail to pay for their purchases by 12:30 pm on the seventh market day following the date of contract and shall on an immediate delivery basis institute a selling-out by the eighth day the securities or any of the securities for which the client has not made full payment by the said due date. The member companies may at any time thereafter sue such clients for the difference and all losses and expenses consequent upon such selling-out. It shall not be necessary for member companies to give notice of all such selling-out and all damages which the member companies may sustain shall be recoverable from the clients as liquidated damages.

It was argued that the above rule and regulation to which the defendant had undertaken to abide by, clearly allowed the plaintiff to force sell any shares that had not been paid for by the 7th day of transaction (T+7). Read with cl. (f) of the Account Application form signed by the defendant, this means that the plaintiff was at liberty to sell them at any time it deemed fit. It was therefore perfectly legitimate, so it was argued, for the plaintiff to sell off the Cash shares on 13 February 1995 as cl. (f) gave it a free hand to dispose of them "in any manner you deemed fit".

Counsel for the plaintiff relied on my earlier decision in *UMBC Securities Sdn Bhd v. Tan Chee Aan* [2001] 6 CLJ 341 wherein I had ruled on the same cl. (f) of a similar Shareholder's Application form involving the same plaintiff on a similar issue, that:

> Additionally, the plaintiff was entitled to rely on clause (f) which authorized it to deal with the shares "in any manner you deemed fit" to sell them at the appropriate time they deemed fit. Provided the sale was conducted *bona fide* to recover the loss that the plaintiff may have to incur by the failure of the defendant to pay for them, the sales could not be impeached.

It must be noted that the force selling rule and regulation of the KLSE did not apply in that case as the plaintiff had agreed to the defendant's request not to force sell the shares upon the latter's default on T+7. What the court had to decide in that case was whether the disposal of the shares some 15 days later after due notice to the defendant was legitimate.

The ruling itself allowed the plaintiff the liberty to sell the shares "in any manner you deemed fit" not in all instances but only if they were sold *bona fide* with the intention of recovering the plaintiff's loss. And since they were disposed of with reasonable promptitude when the defendant eventually failed to pay for them, it was held that the disposal was perfectly legitimate.

The ruling that the plaintiff was entitled to rely on cl. (f) was intended to apply only in the limited factual setting of that case. To elucidate, perhaps more need to be said of the construction of cl. (f) of the Shareholder's Application form that the defendant had signed in that case. At common law, a party who is entitled to claim damages for breach of contract is nevertheless under a duty to mitigate against the loss that the other party has to bear. He would be allowed to claim only so much of the loss that he cannot avoid. The principle can be better understood by referring to a passage in *McGregor on Damages*, 16th edn at para. 285:

> The first and most important rule is that the plaintiff must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed through unreasonable action or inaction, to avoid. Put shortly, the plaintiff cannot recover for avoidable loss.

The words "conducted *bona fide* to recover the loss" in the context of *UMBC Securities Sdn Bhd v. Tan Chee Aan, supra,* was meant to correlate to the duty of the plaintiff to mitigate the defendant's loss, that is to say, the duty to sell the shares at a reasonably opportune time taking into consideration the volatile price movement of the stock market, so as to minimise the defendant's loss.

It would of course be somewhat unrealistic to impose an overly onerous duty on the stockbroker by insisting that he sells them off at the highest price to mitigate his client's loss. Time is always of the essence in the volatile environment of the stock exchange and a stockbroker is perfectly entitled to look after his own interest in as much as he may have to contemplate on his client's interest. I would therefore consider the stockbroker's duty discharged if he acts *bona fide* with reasonable promptitude to dispose of his client's shares to recover his loss at the price then prevailing.

In the instant case it is clear that the obligation of the defendant to pay for the purchase of the shares by T+7 had not been varied. It follows therefore the plaintiff's failure to sell the shares on T+8 as mandated by the KLSE was by its own default. No evidence was adduced as to why the plaintiff only sold the shares some seven months after the date of transaction. One can therefore conclude that the sale could not have been conducted *bona fide* to recover the plaintiff's loss. The plaintiff could not therefore rely on cl. (f) to justify the sale of the shares on 13 February 1995.

The Plaintiff's Contra-loss Or The Defendant's Contra-gain?

The dispute cannot be resolved by the KLSE rules and regulations with respect to force selling as the plaintiff had failed to force sell the shares on T+8 and the rules and regulations did not provide the plaintiff with the right to force sell after that date. It has to be resolved by considering the respective right of the parties under the law *sans* the KLSE rules and regulations.

At common law a party may waive (with or without consideration) his right or a part thereof in a contract. That principle is embodied in s. 64 of the Contracts Act 1950, which read as follows:

> Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he may thinks fit.

An authoritative rendition of that section was made by Gunn Chit Tuan SCJ (as he then was) in the Supreme Court case of *Associated Pan Malaysia Cement Sdn Bhd v. Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 2 CLJ 913; ([1990] 1 CLJ (Rep) 15) at p. 924 (p. 28):

> But we agreed with Mr. Sri Ram that s. 64 of our Contracts Act 1950, which was also not brought to the attention of the learned judge, represents a departure from the common law in England. Our law on waiver in s. 64 of the Contracts Act 1950, is similar to the Indian law on the general principle of waiver under which it is open to a promisee to dispense with or remit wholly or in part the performance of the promise made to him or he can accept any promise which he thinks fit. Under our law neither consideration nor an agreement will be necessary.

By failing to exercise its right to force sell the shares on T+8 as required under the Prescribed Regulations for Selling-out, *supra*, the plaintiff must be taken to have waived its right to sell them on that day. Having arrived at this finding one must now proceed to determine the ensuing rights and obligations of the parties starting with the premise that, in law once the shares were purchased the ownership of those shares remained with the defendant notwithstanding that he had not paid for them. They would continue to remain

in his ownership, notwithstanding that the plaintiff had a contractual right to sell them off to recover the purchase price in the event that he failed to pay for them. Unless and until they were sold the defendant continued to exercise control and dominion over the shares consistent with his status as owner and may direct the plaintiff to sell them at any time on his terms. He was therefore perfectly at liberty to direct the plaintiff to sell the shares at RM11.20 on 20 June 1994 when they were re-listed on the KLSE as he would in the normal course, as the shares were still in the hands of the plaintiff. A failure on the part of the plaintiff to sell them as directed constituted a breach of an essential term of the contract express or implied to which the defendant would be entitled to claim damages.

The claim involved transactions of some antiquity, when the plaintiff was then known as UMBC Securities Sdn Bhd. By the time this suit is heard eight years later, both the Senior General Manager Yong Yuen Fatt and his subordinate the dealer's representative Leow Yuen Pong, had left the plaintiff. Not surprisingly therefore in this trial they found themselves on opposite sides giving contradicting evidence with respect to whether any instruction was given to the latter to force sell when the Cash counter reopened for trading on 20 June 1994. The truth however need not be determined as it is immaterial whether or not any such instruction was given. It is clear to me that the defendant did instruct the Senior General Manager to convey the sell order to the dealer's representative and in the absence of any evidence of a collusion between the defendant and the Senior General Manager, I am apt to find that instruction constitutes an effective order to the plaintiff to sell the shares on 20 June 1994 for the following reasons:

i. Yong Yuen Fatt was a senior employee of the plaintiff who had assumed the responsibility to instruct the dealer's representative to sell the shares;

ii. he was well aware of the defendant's position with respect to the 50 lots of Cash shares; and

iii. all the defendant's previous dealings with the plaintiff including the purchase of the 50 lots of Cash shares had been conducted through the Senior General Manager Yong Yuen Fatt, and never directly with the dealer's representative Yeow Yuen Fong.

A failure to carry out the instruction constitutes a breach on the part of plaintiff of its obligation to sell the shares on the instruction of the defendant. The evidence clearly points to the fact that the shares could be sold at RM11.20 on 20 June 1994. The defendant was therefore entitled to counterclaim on the

basis that had the shares been sold on his instruction on 20 June 1994 at that, price, he could have made a substantial contra gain instead of suffering a contra loss when the plaintiff force sold them only on 13 February 1995.

The Decision In *Keppel Finance* Distinguished

At first blush the decision may appear to be at variance with the decision of VC George J (as he then was) in *Keppel Finance Ltd v. Phoon Ah Lek* [1994] 3 MLJ 26. The court in that case had to decide whether *Keppel Finance* to whom the defendant had charged his shares to obtain a loan in a share margin trading account had the right to sell them when the value of shares pledged fell below the margin. The decision of the court in that case fell on the construction of cl. 13 of the loan agreement and a clause of the memorandum of deposit that the defendant signed with the plaintiff.

Clause 13 of the loan agreement read as follows:

> When the security created by this agreement shall become enforceable the lender shall without prejudice to any other remedies ... forthwith be entitled as and when they shall think fit with or without notice to all or any of the following:
>
> (a) sell or dispose of the securities or any part thereof ... in such manner and for such consideration the lender shall think fit.

The clause in the memorandum of deposit read as follows:

> ... if and whenever the market value of the mortgaged securities does not exceed my indebtedness by 154 % you are at liberty without demand or notice to sell as you think fit all or any part of the mortgaged securities ...

The lender *Keppel Finance* did not sell the shares when they fell below the margin several times but sold them very much later at the expiry of the loan period by which time the amount realised from the sale became grossly insufficient to pay off the loan. It was held that the loan agreement gave the lender *Keppel Finance* the liberty to sell the shares as it saw fit and that they were not expected to forthwith sell off all the shares on default or on the margin not being met. The defendant's argument that the lender had been negligent in not disposing of the shares immediately after the margin was breached was rejected.

It will be at once discernible that the decision in *Keppel Finance* is concerned only with the right of a finance company to dispose of shares that had been charged to it under an agreement to secure a loan. That right to dispose of the shares in any manner it thinks fit, it is clear was acquired under the loan agreement. It is not concerned with the right of the stockbroker as in the present case, to dispose of shares bought for a client on his instruction which

was not paid for by a certain date – where that right to deal with the shares as owner had never been curtailed and had always remained with the defendant. At most the plaintiff could only claim a *lien* over the unpaid shares; but so long as they still remain in the hands of the plaintiff, the defendant retained the right to deal with them as owner including the right to instruct the plaintiff to sell them.

The plaintiff's claim is dismissed with costs. The defendant's counterclaim is allowed with costs.